

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMON KEITH WALTERS,

Defendant-Appellant.

UNPUBLISHED

May 20, 2003

No. 238393

Oakland Circuit Court

LC No. 00-175402-FH

Before: Talbot, P.J., and White and Murray, JJ.

PER CURIAM.

Defendant was convicted of possession of marijuana, MCL 333.740(2)(d), possession of a short-barreled shot gun, MCL 750.224b, felon in possession of a firearm, MCL 750.24f, and two counts of possession of a firearm in the commission of a felony, MCL 750.227b. He was sentenced to 231 days for possession of marijuana, six months to ten years for the possession of a short-barreled shotgun and felon in possession of a firearm convictions, running consecutive to the two year sentences for the felony firearm convictions. The short-barreled shotgun and felon in possession counts were enhanced under MCL 769.11. Defendant appeals as of right, and we affirm.

Defendant first asserts that he was deprived of his constitutional rights when the trial court read the information to the jury and thereby informed it that defendant previously had been convicted of criminal sexual conduct. Defendant argues that the trial court committed plain and prejudicial error in reading the information, and that trial counsel was ineffective in not objecting and requesting a new jury panel.

Defendant failed to preserve this issue below. We thus review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Under this standard, this Court will reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* While it would have been prudent for the trial court to have raised the issue with counsel before reading the information, the court agreed to delete all reference to the criminal sexual conduct conviction once the issue was raised. At that time, defense counsel responded to the court's inquiry whether because the court had already referred to two felonies, one being criminal sexual conduct, the prejudice had already occurred, by stating "Not necessarily, Judge, they heard it briefly." Thereafter, the court referred to the prior receiving and concealing conviction and a second, unspecified, felony that fell within the relevant dates. The CSC conviction was never referred to

again. We conclude that defendant has shown no reversible error. None of the underlying felonies were at all similar to the CSC conviction. The jury understood that defendant was a convicted felon. Assuming the jury kept in mind the prior CSC conviction, notwithstanding the fleeting reference, we are not persuaded that the information affected the jury's decision or the fairness or integrity of the proceedings.

Similarly, we conclude that defendant is not entitled to a new trial based on the ineffective assistance of counsel. "To establish a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation prejudiced him so as to deprive him of a fair trial." *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). "A defendant must show that, but for the error, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable." *Id.* While counsel should have raised the issue before the court read the information, we are satisfied that the outcome of the trial would not have been different. Further, we are unable to conclude that counsel's handling of the matter after the information was read was ineffective. Counsel then secured a ruling that assured that the CSC conviction would not be referred to again. While counsel might have requested a new jury panel, it is uncertain whether the court would have perceived that the panel was sufficiently tainted, and counsel may well have concluded that the jury was nevertheless a favorable one.

Defendant next asserts that the court erred reversibly in failing to sua sponte instruct in accordance with CJI2d 4.1, regarding defendant's statement to police, and that counsel was ineffective in failing to request the instruction. Jury instructions are reviewed in their entirety to determine whether there is error requiring reversal. *People v Brown*, 239 Mich App 735, 745; 610 NW2d 234 (2000). MCL 769.26 provides that:

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

We conclude that the jury was adequately instructed on the issues governing the case, including that it was up to the jury to decide which witnesses to believe, the extent to which the witnesses should be believed, and the importance of their testimony. While CJI2d 4.1 elaborates on this instruction as it relates to a defendant's statement, the general instruction adequately covered the subject matter. Thus, defendant's claim of ineffective assistance must also fail, as defendant cannot show the requisite prejudice.

Affirmed.

/s/ Michael J. Talbot
/s/ Helene N. White
/s/ Christopher M. Murray